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NO. 98554-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Welfare of:

G.J.A., A.R.A., S.S.A., J.J.A., and V.A.,
Minor children.

C.A. (mother),
Appellant,

v.

Washington State Department of Children, Youth, and Families,
Respondent.

**AMICI CURIAE BRIEF OF THE NATIONAL INDIAN CHILD
WELFARE ASSOCIATION, NATIONAL INDIAN JUSTICE
CENTER, AND NORTHWEST JUSTICE PROJECT**

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IDENTITY AND INTEREST OF *AMICI*

The National Indian Child Welfare Association (NICWA) is a non-profit organization dedicated to the well-being of American Indian and Alaska Native children and families. The National Indian Justice Center (NIJC) is a Native-owned nonprofit dedicated to improving the administration of justice in Indian Country through training and technical assistance programs for tribal, state, and federal agency partners. The Northwest Justice Project (NJP) is a statewide civil legal aid firm invested in ensuring that the rights of Indian children, parents, and tribes are fully protected. All three organizations – collectively, amici – are committed to protecting and preserving the Indian Child Welfare Act (ICWA) and ensuring its proper implementation. Amici’s interests are fully set out in their motion to participate as amici curiae.

ISSUE ADDRESSED BY *AMICI*

How “active efforts” impact Indian families’ health and survival and how they should be implemented and measured.

ARGUMENT

Congress intended the Indian Child Welfare Act (ICWA)¹ to rectify the systematic practice of removing Indian² children from their families, and ICWA's "active efforts" provision is the law's remedy for that targeted and disproportionate removal. Yet, statistics show that vestiges of those assimilationist practices are alive today, as Indian children are still removed from their homes at far greater rates than the rest of the population. *E.g.*, WASHINGTON STATE DEP'T OF CHILDREN, YOUTH, & FAMILIES, WASHINGTON STATE DCYF RACIAL DISPARITY INDICES REPORT 9 (2018) [hereinafter DCYF RACIAL DISPARITY REPORT] (showing that in 2014-2016, Native American children in Washington were removed from their homes by child protective services (CPS) at a rate of about seven per 1,000 children, compared to a rate of about two point five per 1,000 for white children or five point four per 1,000 for black children (the next highest rate)). It is imperative that courts and child welfare workers have clarity about what active efforts require. If active efforts are not afforded parents, the troubling disproportionality that led to ICWA's creation is exacerbated.

This truism is illustrated by the current case. Without active efforts, a mother's Indian children were withheld from her care. Most

¹ Amici refer to the federal Indian Child Welfare Act (25 U.S.C. §§ 1901-1963) as "ICWA" and the Washington State Indian Child Welfare Act (Ch. 13.38 RCW) as "WICWA". When referring to both together, amici use the term, "the Acts."

² Amici use the term "Indian" rather than "American Indian/Alaska Native" or "Native American" in this brief where "Indian" is a term of art.

were placed in foster care, away from their family. And now, a termination trial looms, before the mother has been provided adequate support in working to overcome the barriers to her parenting.

I. ICWA and WICWA are intended to prevent the unwarranted removal of Indian children from their homes, and “active efforts” is the mechanism by which that is accomplished.

ICWA has been called the “gold standard” of child welfare policy because the core provisions of the law exemplify best practices in protecting children from harm, specifically the harm of removal from their parents. *See, e.g.*, Brief of Casey Family Programs et al. as Amici Curiae Supporting Respondent Birth Father 7, *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013) (Appellate Brief); *see also* RCW 13.38.040(2)(b). The federal and state legislatures crafted ICWA and WICWA to rectify “the horrific wrongs of widespread removal of Native children from their families.” *Matter of Dependency of Z.J.G.*, 196 Wn.2d 152, 157, 471 P.3d 853 (2020). The Acts effect this goal by compelling the state to actively work to prevent the breakup of the Indian family, a requirement encapsulated in the “active efforts” provision. 25 U.S.C. § 1912; RCW 13.38.040(1).³

³ The active efforts requirement is “designed *primarily* to ensure that services are provided that *would permit the Indian child to remain or be reunited with her parents*, whenever possible, *and helps protect against unwarranted removals* by ensuring that parents who are, or may readily become, fit parents are provided with services necessary to retain or regain custody of their child.” BUREAU OF INDIAN AFFAIRS, U.S. DEP’T OF INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 39 (Dec. 2016) [hereinafter BIA GUIDELINES] (emphasis added).

These efforts are intended to overcome the legacy of distrust of child protection agencies resulting from the government's history of efforts to destroy Indian families and culture. Tom Tremaine, *Indian Child Welfare Act*, in WASHINGTON STATE JUVENILE NON-OFFENDER BENCHMARK ch. 29, § 8a (Stacey Lara ed., 2017), <https://www.wacita.org/benchmark/chapter-29-indian-child-welfare-act/> (last visited Dec 18, 2020) [hereinafter BENCHMARK]. Although the requirement was created to right an historical wrong, its tailored remedy is unfortunately just as needed today. Indian children are still removed from their homes at far disproportionate rates to non-Indian children, revealing the persistence of biased child welfare practices. Nationally, in state child welfare systems, Indian children are the most likely to be removed from their homes as a first resort, and *Indian families are the least likely to be offered family support interventions* intended to keep children within the home. NAT'L INDIAN CHILD WELFARE ASS'N, TOP 10 ICWA MYTHS FACT SHEET: DISPELLING MYTHS ABOUT THE INDIAN CHILD WELFARE ACT OF 1978 (ICWA) (2017) <https://www.nicwa.org/wp-content/uploads/2017/04/Top-10-ICWA-Myths.pdf>; NAT'L INDIAN CHILD WELFARE ASS'N, SUBSTANCE ABUSE AND CHILD WELFARE IN AMERICAN INDIAN AND ALASKA NATIVE FAMILIES <http://www.cffutures.org/files/NICWA.pdf> [hereinafter CHILD WELFARE IN AI/AN FAMILIES] (noting that Indian children are three times more likely than non-Indian children to be removed from their homes, instead of receiving in-home family preservation services).

These trends hold true in Washington as well, a phenomenon that this court has already recognized. *Matter of the Dependency of Z.J.G.*, 196 Wn.2d at 172. In this state, Native American families are far more likely than others to be child welfare involved. Department of Children, Youth, and Families (DCYF) records from 2011-2017 show that Native American families consistently have the highest rate of referral to the child welfare system, intakes opened for investigation or services, and out-of-home placement after intake, and that trend is not changing. DCYF RACIAL DISPARITY REPORT; *see also* KIDS ARE WAITING & NAT'L INDIAN CHILD WELFARE ASS'N, TIME FOR REFORM: A MATTER OF JUSTICE FOR AMERICAN INDIAN AND ALASKAN NATIVE CHILDREN 14 (2007) [hereinafter TIME FOR REFORM] (noting that Indian children make up two percent of the state's child population but eight point four percent of the foster care population). On the caregiver side, Native Americans have founded findings of child abuse or neglect at four times the rate of white individuals and three times the average rate due, in part, to the investigation of Native Americans for child abuse and neglect at higher rates than for other races. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 72 (2015).⁴ The data are clear: disproportionate removal of Indian children – the wrong that the active efforts requirement is meant to remedy – persists. The combination of the Acts' mandate to prevent family breakup and the existing racial disparities caused by CPS

⁴ A data analyst with whom NJP consulted confirmed that the numbers reported here cannot be due to statistical chance alone.

involvement begs for guidance by this Court on how DCYF should carry out the active efforts requirement.

II. Indian families are predominantly involved in the child welfare system for allegations due to consequences of poverty, historical trauma, and thus, substance use disorders and mental health issues.

Since “active efforts” is the key mechanism for undoing the disparity of Indian family involvement in the child welfare system, this Court should look to how the disparity occurs in the first place. Indian children predominantly wind up in the child welfare system due to allegations of neglect. TIME FOR REFORM 1 (noting that Native American children are more likely than children of other races/ethnicities to be identified as victims of neglect and are the least likely to be identified as victims of physical abuse). As the crafters of ICWA noted,⁵ the child welfare system all too often misconstrues the collateral circumstances of poverty as “neglect.” Maren K. Dale, *Addressing the Underlying Issue of Poverty in Child-Neglect Cases* (Apr. 10, 2014), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/addressing-underlying-issue-poverty-child-neglect-cases/>. The disparity of Native Americans in the child welfare system suggests that neglect allegations against Indian parents are likely due to collateral circumstances of the family rather than child maltreatment. *See id.* (listing neighborhood economic status, employment, food security, and depression as other factors correlated with child neglect allegations).

⁵ H.R. REP. NO. 95-1386, at 10-12 (1978).

Native communities experience some of the highest rates of poverty in Washington, *e.g.*, WASHINGTON STATE DEP'T OF HEALTH, SOCIOECONOMIC POSITION IN WASHINGTON 2 (Dec. 2016) (showing American Indians with the highest rate of poverty in the state in 2014), and some of the worst access to basic health, mental health, and behavioral health services. Michael Crowe, *Native Americans in Washington face serious health care disparities* (Nov. 23, 2020), <https://www.king5.com/article/news/community/facing-race/native-americans-washington-serious-health-health-care-disparities/281-655c6065-30de-4506-bc34-4a54412882ea>. Beyond being ill-equipped with resources needed for stability, Native American communities are often those most in need of services and treatment. Due to federal and state government policies, the history of tribes within this country is awash in incidences of violence, displacement, and forced assimilation, all of which contribute to intergenerational trauma and engender feelings of powerlessness and hopelessness in Indian families. *Mental Health, Substance Abuse, and Domestic Violence in American Indian and Alaska Native Communities*, CHILDREN'S BUREAU, <https://www.childwelfare.gov/topics/systemwide/diverse-populations/americanindian/mentalhealth/> (last visited Dec. 19, 2020); CHILD WELFARE IN AI/AN FAMILIES. The confluence of higher poverty; less access to physical, mental, and behavioral health services; and historical and continued trauma generates higher rates of mental

illness⁶ and substance use disorder within Native communities.⁷ U.S. DEP'T OF HEALTH & HUMAN SERVS., SUPPORTING THE DEVELOPMENT OF YOUNG CHILDREN IN AMERICAN INDIAN AND ALASKA NATIVE COMMUNITIES WHO ARE AFFECTED BY ALCOHOL AND SUBSTANCE EXPOSURE 4 https://www.acf.hhs.gov/sites/default/files/ecd/tribal_statement_a_s_exposure_0.pdf [hereinafter AI/AN COMMUNITIES]. And, records show that these are more often than not the reasons behind Native American involvement in the child welfare system. *See, e.g.,* CHILD WELFARE IN AI/AN FAMILIES (reporting that roughly 85 percent of all Indian child welfare cases are related to substance use disorder).⁸ Thus, these are the precise barriers child welfare workers must be prepared for and adept at addressing when supporting Indian families per the directive of ICWA.⁹

⁶ Stress, adversity, and poverty are associated with depression. AI/AN COMMUNITIES 4. Moreover, mood disorders are predictable outcomes from inadequate access to health care, healthy nutrition, secure housing, safe physical environments, and educational and economic opportunities. *Id.*

⁷ Co-occurring mental illness and substance use disorders are more than double in Indian populations than the general U.S. population. AI/AN COMMUNITIES 4.

⁸ Although there may be greater incidence of substance use disorders in Native communities due to historical trauma, the child welfare system treats these families differently than others struggling with substance issues. When families are referred to child welfare because of a substance problem, Indian children are eight times more likely to be removed from their home instead of receiving in-home family preservation services than non-Native children. CHILD WELFARE IN AI/AN FAMILIES.

⁹ Amici note that the mother in this case is non-Native. The Acts' focus, however, is on the Indian family as a whole and the experiences of the children in particular. The children in this case are Indian and thus the relevance for the family unit as a whole can be imputed. *See Matter of Dependency of A.L.K.*, 98487-5, 2020 WL 7650454, at *10 (Wash. Dec. 24, 2020) (Montoya-Lewis, J., concurring) (noting that a non-Native parent who is part of an Indian family is entitled to active efforts).

III. Recognizing that intergenerational trauma and poverty underlie Native American child welfare involvement requires “active efforts” to include responses and services tailored to and capable of addressing these barriers.

Active efforts are DCYF’s responsibility to provide parents what they need to be whole again vis-à-vis their parental deficiencies, as identified in court order, individual service plans, or petitions for termination of parental rights. RCW 13.38.040(1)(a). This Court must give guidance to lower courts that is both specific and enforceable to prevent Indian families from being separated. *See also In re Dependency of P.H.V.S.*, 186 Wn. App. 167, 181, 339 P.3d 225 (2014), *as amended on denial of reconsideration* (Mar. 2, 2015) (providing that the three-pronged purpose of a dependency proceeding is “to protect children from harm, help parents alleviate the problems that led to intervention, and reunite families where appropriate”) (emphasis added). Given the circumstances leading to high Indian family involvement in the child welfare system, amici recommend that this Court give guidance in three key areas: (1) engagement and communication, (2) family relationship, and (3) substance use disorder and mental health treatment. In all three, working with a parent-centered approach distinguishes active efforts from passive ones.

First, engagement is of primary importance, because without it, there is no hope for a social worker to assist a parent. Accordingly, the Acts emphasize engagement in their definitions of active efforts. RCW 13.38.040(1)(a) (specifying that active efforts includes “*actively work[ing] with the [parent(s)]*” and “*engaging the [parent(s)] in . . . preventive,*

remedial, or rehabilitative services . . . beyond simply providing referrals”); 25 C.F.R. § 23.2 (requiring that active efforts “must involve *assisting the [parent(s)] through the steps of a case plan and with accessing or developing the resources necessary . . .*”; 25 C.F.R. 23.2(2) (providing the example of “[i]dentifying appropriate services and *helping the parents to overcome barriers*, including *actively assisting the parents in obtaining such services*”) (emphasis added). Communication is an integral part of this. The Washington Juvenile Non-Offender Benchbook contemplates that a social worker could fail in providing active efforts, even after investing “tremendous effort into identifying services and making referrals” simply by using a “fundamentally culturally inappropriate” approach to communication. BENCHBOOK § 8a. “[T]rusting relationships with families enable[] strong partnerships,” which are “pre-requisites to supporting families well and, once established, can serve as the foundation to more extensive support.” AI/AN COMMUNITIES 16.¹⁰ The well-warranted mistrust many Indian families have of government workers¹¹ further heightens the need for a robust relationship between the social worker and parent for a parent’s chance at success in a dependency.

¹⁰ Trusting partnerships are especially important in cases where families are managing challenging issues such as substance use and mental health. AI/AN COMMUNITIES 16.

¹¹ Native communities often doubt the U.S. government and its motives due to the government’s boarding school policies, treaty violations, deception regarding reservation lands and sizes, and allotment process. Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 Tulsa L. Rev. 149, 161 (2007). The state’s use of police power to bring American Indian children into the child protection system perpetuates the cycle of removal and as a result, is another source of distrust. *Id.*

To build this trust and respect, social workers must approach this work in a parent-centered way, including positive, strengths-based, and non-judgmental family engagement. AI/AN COMMUNITIES 11. This means not judging parents for the problems that led to the child welfare intervention, demonstrating the desire to build strong relationships with them, and focusing on their strengths to work together for child and parent healing. *See id.* (discussing this dynamic in the particular context of working with substance misusing parents); *see also Matter of Dependency of A.L.K.*, 2020 WL 7650454, at *6-7 (concluding that DCYF must engage in active efforts even if services are unwanted). Showing parents that they are sincerely listening to their needs, affording them the benefit of the doubt, and willing to shape their practices to the parents' circumstances, rather than expecting parents to conform to their practices, will yield dividends for their work to address barriers to family reunification. Without this baseline relationship of respect and trust, social workers will be unable to help the parents overcome their barriers (25 C.F.R. § 23.2(2)), complete the steps of a case plan (RCW 13.38.040(1)(a), 25 C.F.R. § 23.2), or access or develop the resources necessary for reunification (25 C.F.R. § 23.2).¹²

¹² The engagement and communication in the instant case was found wanting. Ms. Seifert should have tried to contact C.A. at all of her various methods of contact, recognizing her explained limitations and the reasonable physical instability resulting from her poverty, homelessness, and substance use disorder. *See Pet'r's Opening Br.* 10-13. Ms. Seifert should have proactively worked to rebuild trust with C.A. when she discovered that C.A. felt she had reason to mistrust her. *See id.* at 5, 24-25. Good communication would have included trying to let C.A. know about Ms. Seifert's (1) efforts in finding a family therapist, (2) decision for delaying submission of the referral for the therapist, and (3) reasons for being unwilling to facilitate visits at that particular stage in the process.

The importance of the social worker-parent relationship for success in a dependency is borne out in the research: researchers Glisson and Green found that “institutional factors such as organizational climate and culture and degree of [social] worker engagement are predictive of access to needed services and positive outcomes [in child welfare].” Janice L. Cooper & Yumiko Aratani, *By What Yardstick Should We Measure Success in Child Welfare Policy?*, CW360°: TRAUMA-INFORMED CHILD WELFARE PRACTICE, Winter 2013, at 14, 15. It is also affirmed anecdotally: one child welfare worker found that when she better understood the impact of history on her Indian clients, she “became more present with them, more inclined to be empathetic, and more understanding of the challenges to their well-being,” which allowed her to be more effective at engaging her clients and helping them access the services they needed. Marilyn J. Bruguier Zimmerman & Patrick Shannon, *Native Families Impacted by Historical Trauma and the Role of the Child Welfare Worker*, CW360°: TRAUMA-INFORMED CHILD WELFARE PRACTICE, Winter 2013, at 30, 30.

Second, family relationship is a priority for active efforts since its preservation is inherently the aim of dependencies. *See, e.g.*, RCW 13.38.040(1)(a) (defining active efforts to require working to engage parents in services “to prevent the breakup of the family”); RCW 13.34.020 (noting that “the family unit is a fundamental resource of American life which should be nurtured”); RCW 13.34.025(2)(a) (prioritizing access to “family reunification services that facilitate the

reunification of the child safely and appropriately within a timely fashion” for parents involved in dependencies). The parent-child relationship is crucial for the health and wellness of both the children and parents. *See* AI/AN COMMUNITIES 11 (discussing this phenomenon in the context of substance misusing parents). Attachment to, and thus visits with, biological parents is critical for the development of a healthy sense of self-esteem, complete identity formation, and ability to relate to others for youth in foster care. *E.g.*, Lenore M. McWey, Alan Acock, & Breanne Porter, *The Impact of Continued Contact with Biological Parents upon the Mental Health of Children in Foster Care*, 10 CHILD YOUTH SERV. REV. 32, 34 (2010). Moreover, withholding or neglecting visits or delaying the return of the children to their parents can cause catastrophic harm to the parent-child relationship since length of placement in foster care and length of periods during which parents do not see their children are both commonly used as evidence supporting termination of parental rights. *See, e.g.*, RCW 13.34.136(3) (requiring DCYF to file a petition seeking termination if a child has been in out-of-home care for 15 of the most recent 22 months); RCW 13.34.138(2)(c)(xi) (allowing periods during which parents do not see their children to be considered against a parent’s progress in a dependency).

This is why regular visits between parents and children are listed as an example of active efforts in the regulations. *See* 25 C.F.R. § 23.2(7). And, WICWA underscores this recommendation by directing DCYF to “encourage the maximum parent and child and sibling contact possible,”

only limiting or denying visitation “*if the court determines* that such limitation or denial is necessary to protect the child[.]” RCW 13.34.136(1)(b)(ii) (emphasis added) (demonstrating that visitation is of such importance that DCYF has no discretion in whether to facilitate it; only the court can limit visitation). Thus, fostering the parent-child relationship is an essential component of active efforts – an integral part of the rehabilitation process, not just a reward at the end of correcting a list of alleged parental deficiencies, to be withheld until its completion.

Third, as already discussed in section II, mental illness and substance use disorders are natural results of the state-imposed adversity and lack of access to healthcare prolific in Native American communities. Thus, it is unsurprising that Native parents struggle with substance use disorders at a higher rate, and have less access to effective treatment, than their non-Native counterparts in the child welfare system. CHILD WELFARE IN AI/AN FAMILIES. Accordingly, child welfare workers must be better trained to work with families dealing with substance use disorders. *Id.*

This work starts with the acknowledgement that substance misuse does not inherently lead to child maltreatment. Congress recognized as much by specifically noting that substance misuse on its own is insufficient to establish that a child is unsafe with a parent and requiring proof of a causal connection between any alleged substance use and the likely harm to the child. 25 C.F.R. § 23.121(d). DCYF’s policy, too, reiterates that substance use is not necessarily a child safety concern. “The state of the parent’s condition is more important than the use of a

substance.” WASHINGTON STATE DEP’T OF CHILDREN, YOUTH, & FAMILIES, PRESENT DANGER GUIDE 10 (June 2011). Even a “decision that a child is unsafe does not mean the child must be removed,” rather removal is only justified when it is “clear that child safety cannot be controlled and managed in the home.” *Id.* at 11.

The work then continues in assisting the parent through learning to manage their substance use disorder. The Administration for Children and Families (ACF) counsels that staff working with these populations “recognize that [substance use disorders] are not the fault of the person with the disease, and are not within that person’s control.” AI/AN COMMUNITIES 11. This reflects the medical fact that addiction is a disease, not a choice. *E.g.*, *What is Addiction?*, AMERICAN PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/addiction/what-is-addiction> (last visited Dec. 19, 2020); *Definition of Addiction*, AMERICAN SOC’Y OF ADDICTION MEDICINE, <https://www.asam.org/Quality-Science/definition-of-addiction> (last visited Dec. 19, 2020). As a disease, social workers’ goal must be to help parents learn how to manage it, just as one would help a diabetic learn how to manage their blood sugar. *Definition of Addiction*. ACF additionally notes that since “[a]ddiction is often a chronic or relapsing disease, supports are needed over the long term, and a relapse is not a sign of failure, but something to be prepared for and expected.” AI/AN COMMUNITIES 11; *see also Definition of Addiction* (noting that treatment methods for addiction are generally as successful as those for other chronic diseases).

Substance use disorder and mental health counseling should be coordinated so that the strategies and resources of each are leveraged to maximize their impact. AI/AN COMMUNITIES 25. Washington's dependency statute contemplates as much, requiring DCYF to work with families to address their multiple needs in a coordinated and integrated fashion. RCW 13.34.025(1)(a). DCYF's major challenge here is finding counselors suitable for serving Indian parents. Many Native Americans face inadequate access to mental health providers due to economic barriers, lack of awareness about mental health issues, and lack of culturally-responsive programs and providers. *E.g., Native and Indigenous Communities and Mental Health*, MENTAL HEALTH AMERICA, <https://www.mhanational.org/issues/native-and-indigenous-communities-and-mental-health> (last visited Dec. 19, 2020). Moreover, given the significant impact of intergenerational trauma on Indian families, it is reasonable to expect Indian parents to be slow to build trust with a counselor, have that trust easily broken, and be more successful working with counselors employing trauma-informed practices.¹³ *See, e.g., Mental*

¹³ Trauma-informed care recognizes the presence of trauma symptoms and acknowledges the role trauma may play in an individual's life. *What is Trauma-Informed Care?*, BUFFALO CENTER FOR SOC. RESEARCH, <http://socialwork.buffalo.edu/social-research/institutes-centers/institute-on-trauma-and-trauma-informed-care/what-is-trauma-informed-care.html> (last visited Dec. 19, 2020). These practices promote a culture of safety, empowerment, and healing. Monique Tello, *Trauma-Informed care: What it is, and why it's important*, HARVARD MEDICAL SCH., <https://www.health.harvard.edu/blog/trauma-informed-care-what-it-is-and-why-its-important-2018101613562> (last visited Dec. 19, 2020). They shift the focus from, "What's wrong with you?" to "What happened to you?" *What is Trauma-Informed Care?* Trauma-informed practices are about meeting the individual where they are at to work toward the goal rather than asking the individual to conform to another's practices and expectations, precisely the aim of active efforts.

Health and American Indian and Alaska Native Communities, CHILDREN’S BUREAU, <https://www.childwelfare.gov/topics/systemwide/diverse-populations/americanindian/mentalhealth/mentalhealth-communities/> (last visited Dec. 19, 2020). This challenge is the mandate of active efforts. *See* 25 C.F.R. § 23.2(2) (specifying that active efforts may include “[i]dentifying appropriate services and helping parents to overcome barriers, including actively assisting the parents in obtaining such services”). DCYF should position itself as an ally in the search for a provider that will work for the parent.¹⁴ Thus, effective “active efforts” includes (i) maintaining family connections when safe (and not assuming substance use makes a parent unsafe); (ii) helping the parent learn how to manage their disease; (iii) continuing to bolster parents with supports through periods of substance use;¹⁵ (iv) finding counseling that requires little to no payment from the family and a provider who can integrate their services with other parts of a parent’s case plan; (v) being ready to provide referrals to more than one provider; and (vi) working with the parent on a plan for transportation to appointments.

In sum, at minimum, “active efforts” is working with Indian parents in a parent-centered way, endeavoring to understand the barriers

¹⁴ In this case, Ms. Seifert’s assumption that C.A. would fail to form a successful patient-counselor relationship with the referred therapist (*see* CP 54) means that Ms. Seifert, by definition, was not fulfilling her statutory responsibility to engage C.A. in services to prevent the breakup of the family. *See* RCW 13.38.040(1)(a).

¹⁵ This medically-informed approach is in stark contrast to conditioning family visits on obtaining a certain length of sobriety or excusing DCYF’s provision of services during a parent’s period of relapse.

from the parent's perspective and working with the parent's particular obstacles to overcome those barriers.¹⁶ In all cases, active efforts must include robust engagement of the Indian parent through trauma-informed communication and dedication to preserve the family relationship. When applicable, which is generally given the demographics of Native American populations involved in child welfare, Indian parents must be supported by social workers with strong understandings of substance use disorders, mental health issues, and their intertwined nature. Social workers must assist parents through learning the skills necessary to manage their disease and find and receive adequate counseling support, rather than expecting parents to figure out these processes on their own. These are essential elements for active efforts to have a chance at success – the goal of ICWA – the reunification of the Indian family.

IV. While it is the child welfare worker's duty to provide active efforts, courts have the responsibility of serving as a check on that work.

It is the court's duty to ensure proper implementation of active efforts. ICWA "*provides no exception to [the active efforts] mandate.*" *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611, 617 (S.D. 2005) (emphasis added). While DCYF has a vested interest in proper implementation of ICWA, "the day-to-day enforcement of ICWA happens in courts." *NCSL's Indian Child Welfare Resources*, NAT'L CONF. OF STATE LEGS. (Nov. 12,

¹⁶ This is in contrast to a department-centered approach that allows the social worker to expect the parent to address and rectify parental deficiencies in the way that works best for DCYF or in the way the individual social worker would.

2019), <https://www.ncsl.org/research/human-services/ncsl-state-tribal-institute-intersection-ec-cwp.aspx>. *See also* 25 U.S.C. §1912(f); RCW 13.38.040(1)(a)(i); RCW 13.38.130(1). The BIA Guidelines recommend that a court “inquire about active efforts *at every court hearing* and *actively monitor compliance* with the active efforts requirement,” further specifying that a court “should not rely solely on past findings regarding the sufficiency of active efforts, but rather *should routinely ask . . .* whether additional active efforts have been or should be provided.” BIA GUIDELINES 43 (emphasis added). Active efforts must be documented in detail in the court record. *E.g.*, 25 C.F.R. § 23.120(b); BIA GUIDELINES 44. Compliance with the requirement is a legal determination to be made by the court and not up to the discretion or suggestions of parties. 25 U.S.C. § 1912(d); 25 C.F.R. § 23.120 (both directing that a court must conclude that active efforts were provided and were unsuccessful prior to ordering an involuntary foster placement or termination of parental rights). *See also Matter of Welfare of A.L.C.*, 8 Wn. App. 2d 864, 871-872, 439 P.3d 694 (2019) (noting that while “all cases involving active efforts contain differing facts[,] the underlying legal issue – the adequacy of the Department’s efforts – remain the same from case to case”). More than

permitting courts to serve as a check on the work of child welfare workers, the statutes and regulations require it.¹⁷

This function is all the more so important if and when bias exists within the child welfare system. *See* CHILD WELFARE IN AI/AN FAMILIES (noting that state child welfare agencies “must be held accountable and required to treat children and families of all backgrounds equitably”). The statistics show that DCYF is not treating Indian children equitably, so judicial oversight of DCYF is critical.

CONCLUSION

Active efforts were not provided in this case, and this Court should hold DCYF accountable for that failure and provide clear direction on how DCYF can do better moving forward. If DCYF succeeds at active efforts, the troubling cycle of disproportionate Native American involvement in the child welfare system is rectified by (1) interrupting intergenerational trauma through enabling future generations to grow up with more stability and learn positive parenting modeled by their own parents; (2) creating more lasting change for individual families by providing parents the tools they need to manage their barriers; and (3) reducing the bias that leads to disproportionate removals of Indian children through changing the

¹⁷ The current case displays critical errors here. The commissioner believed it was “not the court’s role” to “critique how social workers could do better,” CP 171, when in fact, that is precisely the role the court must play. The court also accepted a prepopulated checkbox, without further exploration or findings, as sufficient indication that the active efforts requirement was met, *see* CP 2, 16, thus failing to meet its responsibility for ensuring dutiful implementation of the Acts.

organizational culture of child welfare agencies, shaped by the problematic practices of the past. Success is possible for DCYF with clearer guidelines and expectations for what active efforts entail.

DATED this 23rd day of December, 2020.

Respectfully submitted,

NORTHWEST JUSTICE PROJECT

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SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Welfare of:

G.J.A, A.R.A., S.S.A, J.J.A., and V.A.,
Minor Children

C.A. (mother),

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF CHILDREN,
YOUTH, AND FAMILIES,

Respondent.

Supreme Court No.
98554-5

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SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the 28th day of December 2020, I caused to be served via the Washington State Appellate Courts' Portal, a true and correct copy of the following:

1. Motion of the National Indian Child Welfare Association, National Indian Justice Center, and Northwest Justice Project For Leave To File Brief Of Amici Curiae;
2. Amici Curiae Brief of the National Indian Child Welfare Association, National Indian Justice Center, and Northwest Justice Project;
3. This Certificate of Service.

Upon: Attorney for Respondent:
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SIGNED at Seattle, Washington, this 28th day of December, 2020.

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